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No. 83-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD ARNOLD, IV and FRANCIS C. MIHALEK,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF BY PETITIONERS RICHARD ARNOLD, IV AND FRANCIS C. MIHALEK

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November 17, 1983

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Petitioners, Richard Arnold, IV and Francis C. Mihalek, pursuant to the provisions of Rule 16.6 of the Rules of the Supreme Court, herewith file this Supplemental Brief, bringing to the attention of this Court certain intervening matter which was not available at the time of the filing of the Petition on September 26, 1983. Petitioners urge upon this Court the consideration of the information contained in this supplemental brief in support of their plea that the Petition for Certiorari be granted.

On December 23, 1982, the United States Court of Appeals for the Fourth Circuit entered its Order (Petition for Certiorari, Appendix E, page 1e) granting the petition for rehearing and suggestion for rehearing *en banc* which had been made by Eastern Air Lines, Inc. ("Eastern"). That Order indicated that Circuit Judge Sam J. Ervin, III, a regular and active judge of the Fourth Circuit Court of Appeals, had recused himself from participation in the deci-

sion whether to grant rehearing *en banc* and from any consideration of the merits of the appeal in the event rehearing was granted.

The Order confirmed information which had been furnished to counsel for Petitioners during a telephone conversation with the office of the Clerk of the United States Court of Appeals for the Fourth Circuit at the time the December 23 Order was entered—that, for "personal reasons" not disclosed, Circuit Judge Ervin felt it appropriate to recuse himself from the appeal process. The nature of the "personal reasons" prompting the recusal was not revealed and no inquiry was made at that time by counsel for Petitioners, believing that that was a private matter and not one to which inquiry should be directed.

Circuit Judge Ervin is a long time resident of Morganton, North Carolina and was for many years one of the most respected Superior Court trial judges in this state. Circuit Judge Ervin also personally knew the Honorable James B. McMillan, the United States District Court Judge who conducted the trial of Petitioners' claims in the Fall of 1979. Both men had been contenders for the seat on the United States Court of Appeals to which Judge Ervin was appointed in May, 1980. Based upon his considerable experience as a trial judge prior to his elevation to the Court of Appeals, Judge Ervin would have had a valuable perspective on the issues of consolidation and counsel misconduct during final argument which were asserted by Eastern in the context of its appeal.

In October, 1983, and after docketing of the petition with this Court, the undersigned counsel for Petitioners was advised by a former clerk to a Judge of the United States Court of Appeals for the Fourth Circuit that the clerk's understanding was Judge Ervin had recused himself from this appeal because of the involvement in this case of his father, the Honorable Sam J. Ervin Jr., an attorney and former United States Senator from North Carolina. The information furnished to counsel for Petitioners was to the effect that former Senator Ervin had been involved in some capacity as counsel or consultant to Eastern in connection with the preparation of the brief submitted by Eastern to the three judge panel which initially heard the appeal.

Counsel for Petitioners immediately contacted Mr. H. Grady Barnhill, Jr. of the law firm of Womble, Carlyle, Sandridge & Rice, which has served as counsel for Eastern on this appeal. Mr. Barnhill was asked whether Senator Ervin had performed any function

in connection with the brief submitted by Eastern to the Fourth Circuit and whether Senator Ervin's role had been communicated to Circuit Judge Ervin. Senator Ervin was never identified in any capacity as counsel on any paper-writing filed by Eastern during the prosecution of its appeal. Mr. Barnhill requested time to confer with Senator Ervin and after doing so reported the following: After the Eastern brief had been prepared by Mr. Barnhill's law firm, it was submitted to Senator Ervin for his review and comment prior to filing with the United States Court of Appeals for the Fourth Circuit; Senator Ervin had been compensated for reviewing the brief. Counsel for Petitioners had previously been advised that the amount of that compensation was three thousand dollars, but Mr. Barnhill was not in a position to comment as to the amount of money paid. The delivery of the brief to Senator Ervin and his review of it had been undertaken at a time when Circuit Judge Ervin, the Senator's son, was a regular, active member of the United States Court of Appeals for the Fourth Circuit.

Counsel for Petitioner then contacted Circuit Judge Ervin and spoke with him by telephone on Thursday, November 3, 1983. Judge Ervin confirmed to the undersigned counsel that he had had a telephone conversation with his father, during the course of which the Senator had disclosed to his son that at the request of Eastern and its counsel, the Senator had reviewed the brief that was submitted by counsel for Eastern to the Fourth Circuit Court of Appeals. Judge Ervin was not personally familiar with the compensation arrangements between Eastern and his father. Upon learning of his father's participation as described above, Judge Ervin determined that he should disqualify himself from hearing anything in connection with the appeal by Eastern. Since Judge Ervin was not initially designated for the three judge panel, his decision to recuse himself did not become known until the petition for rehearing was filed.

Without directly attributing any improper motive or unethical conduct to anyone involved in the scenario described above, counsel for Petitioners respectfully suggests that these circumstances dramatically point up a potential for manipulative abuse of the appellate process in the Circuit Courts of Appeals relating to disqualification of judges. It is clear that the recusal of Judge Ervin was compelled by conduct of counsel for Eastern in retaining the services of this Judge's father at a time while the appeal was pend-

ing before the Fourth Circuit. A repetition of that conduct or the association of the former law firm of some other judge of the Fourth Circuit during the prosecution of an appeal would inevitably require the recusal of those otherwise qualified, impartial circuit judges merely upon the basis of their family ties or business associations.

The recusal of Judge Ervin under these highly unusual circumstances is significant to the issues presented to this Court in the petition now pending because it was his recusal which gave rise to the decision by the Fourth Circuit to exclude this regular, active judge from the calculation of the numerical majority of circuit judges necessary to order rehearing *en banc* under 28 U.S.C. §46(c). This Circuit Court has now established a precedent which will consistently reduce the number of affirmative votes necessary to order *en banc* rehearing whenever one or more circuit judges recuses himself, even where the basis of such recusal is procured by conduct of counsel for one of the parties.

Petitioners have urged upon this Court in their petition the premise that the recusal of a circuit judge in no way affects the provision of 28 U.S.C. §46(c) requiring the affirmative vote by "a majority of the circuit judges of the circuit who are in regular active service" in order to grant rehearing *en banc*. That interpretation is one which has been adopted by a clear majority of the circuit courts which have considered the impact of recusal upon the *en banc* rehearing process. It also serves the salutary purpose of discouraging any attempt to improperly influence the constituency of circuit judges eligible to vote upon the rehearing issue.

Respectfully submitted,

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